

In the Matter of:)
)
 Partial and Conditional) Docket _____
 Overrides of Certain Bans on)
 On Amateur Radio Antennas)

Instead of covering all licensed Amateur Radio operators, we propose to limit antenna ban overrides solely to those hams who are also trained and skilled emergency communicators. We propose to call these hams Emergency Communications Operators, with “EmComm Operators” or ECOs as the shorthand term.

We envision specific eligibility criteria which must be met -- and maintained through periodic self-certifications.

We further propose to maximize the Commission’s administrative convenience by relying on self-certification. However, we also advocate, as a deterrent to temptation, fines of as much as \$50.00 per day for any fraudulent self-certification.

By the same token, we further propose fines of up to \$50.00 per day for a knowing failure to provide “reasonable accommodation” where it is required.

Another difference from past Petitions is HFA’s inclusion of proposed guidelines for defining “reasonable accommodation”. Rather than requiring case-by-case determinations of what constitutes “reasonable accommodation”, which is virtually certain to involve costly and time-consuming litigation, and perhaps other delays, this Petition establishes “presumptions” that restrictions on antennas and/or related equipment are “reasonable” so long as certain minimum options are preserved.

At the same time, to leave room for atypical operating conditions and/or other atypical circumstances, we propose to make these presumptions “rebuttable”. Therefore, any presumption of reasonableness can still be challenged in court, on a case-by-case basis, by any affected party, *if* a relevant and significant deviation from the national norm can be demonstrated by a preponderance of the evidence.

2. How HFA's Approach Differs From Current Congressional Legislation To Override Antenna Bans

In addition to past, unsuccessful Petitions For Rulemaking on this issue, legislation to override antenna bans has also been introduced in the U.S. House of Representatives by Representative Steven Israel, D-NY. He introduced H.R. 1478 in 2003 and H.R. 3876, an identical proposal, in 2005.

When he introduced H.R. 3876, Representative Israel was joined by Representative Mike Ross, D-AR, as another primary sponsor. Representative Ross serves on the House Energy and Commerce Committee.

This bill, like past Petitions For Rulemaking to the FCC, proposes to cover all hams in its antenna ban overrides.

In another similarity with past Petitions to the FCC, the bill mandates "reasonable accommodation" of ham antennas, but does not define the term -- meaning that its meaning must be hammered out case-by-case, probably through litigation on many occasions.

As **Appendix A** to this new Petition, HFA has included a CHART which highlights how the HFA Petition differs from the Israel/Ross bill on 3 key points.

3. HFA's Proposed Eligibility Criteria For Emergency Communications Operators

As noted above, past Petitions for antenna ban overrides have proposed to cover all licensed Amateur Radio operators.

However, the Members of HAMS FOR ACTION believe that such overrides will be much more acceptable in affected neighborhoods if the overrides are limited to hams who are clearly performing a vital and necessary service for the community involved.

The demonstrated willingness and ability to conduct Emergency Communications is indisputably such a service.

A. How The Proposed Eligibility Criteria Serves The Public Interest

(1) The first advantage for the affected communities is that Emergency

Communications Operators can now be present in neighborhoods where, as a practical matter, they are currently outlawed by contractual fiat.

Amateur Radio is a form of communications that can operate when everything else is down. Because it is a decentralized communications operation with widely scattered participants, it can report more information about more places than virtually any competing information source. Due to the same decentralization, coupled with the prevalence of Amateur Radio operators who have independent power supplies, the Amateur Radio Service can function even when the electric power grid cannot.

During Hurricane Katrina, when even sophisticated military communications were not operating, the President of the United States was able to communicate with the Mayor of New Orleans through Amateur Radio Service volunteers.

In addition, Amateur Radio is often “the firstest with the mostest” in alerting the world to potentially life-saving details of a disaster. Hams provided the first reports to come out of Chernobyl, the recent Asian Tsunami mega-disaster areas and many other sites of catastrophic events.

As another benefit for the general public, the proposed partial and conditional overrides of antenna bans would also empower ECOs to participate in self-training in communications and electronics technology. This will increase the number of Americans with technological skills, some of which are marketable or can become so.

(2) The second advantage for the affected communities is that the eligibility criteria will limit the impact of the overrides, at least initially, to a much smaller number of hams. Given the nature and pace of the self-certification process, it is unlikely that neighborhoods will see a sudden surge of ham antennas overnight.

(3) The third advantage, for the affected communities and the entire nation, is that those new ham antennas which do appear will be owned or used by certified ECOs.

Ultimately, this may be the biggest advantage of all: creation of an incentive for a growing percentage of hams to become trained Emergency Communicators Operators.

See the Section below for a discussion of other proposed eligibility criteria, which address aesthetic concerns.

3. HFA's New Approach To Addressing Aesthetic Concerns

In another difference from past Petitions, HFA addresses aesthetic concerns.

Past Petitions, by proposing to mandate an undefined version of “reasonable accommodation”, have left it up to the parties to battle over aesthetics on a case-by-case basis. Such a policy encourages costly and time-consuming litigation, as well as other avoidable delays. The lack of clear standards also undercuts negotiations. In the absence of clear “starting points” for negotiation, parties are free to project their fears --

rather than their hopes -- into the vacuums of uncertainty about what other parties might do.

To avoid, or at least minimize, this problem, the HFA Petition For Rulemaking proposes some fixed requirements -- plus a set of “reasonable presumptions” which can guide the remaining interactions between the parties.

A. Proposed “Fixed Requirements” To Address Aesthetic Concerns

As one “fixed requirement”, the Petition proposes that conditions for an ECO self-certification must include painting of the ham’s exterior antenna. The ECO must certify that all owned or used exterior antennas, and equipment, have been painted a color which matches, at least approximately, the immediate surroundings.

As a fixed requirement for re-certification, the Petition proposes a “3-Year Rule”.

HFA’s 3-Year Rule requires that every ECO, at 3-year intervals after the initial certification (Years 3, 6, etc.), must certify to the FCC that he or she has physically inspected the exterior antenna within 60 days of the anniversary date, or more frequently if needed. The ECO must also certify that, based on the inspection(s), he or she has re-painted and/or repaired and/or otherwise maintained the equipment, if needed.

B. Proposed “Rebuttable Presumptions” To Address Aesthetic Concerns

In addition to the fixed aesthetic requirements, discussed above, we also propose to establish a “rebuttable presumption” for determining what constitutes “reasonable accommodation” of an ECO’s exterior antennas and related equipment.

The use of a legal presumption will strongly discourage costly and time-consuming litigation. It will also reduce the likelihood of protracted negotiations, since all parties will now have reasonable “starting points” for any negotiated modifications.

At the same time, because these “starting points” are rebuttable in court, when and if sufficient evidence can be mustered, there is still room for one or more parties to

pursue litigation if they believe they can demonstrate special circumstances, such as unusual topography. Such evidence can also be brought to bear during negotiations.

Thus, the HFA Petition would discourage litigation, and/or other delays, but would not prevent them.

Hams could be “rebuttably” limited to “low visibility” wire antennas, with a height of 20 feet, in the case of single family homes and townhomes. The width of such antennas would be rebuttably required to remain within the limits of the ham’s property.

In the case of apartments and condominiums, hams would be rebuttably limited to antennas which do not exceed 3 feet in height, or 3 feet in width, and which are placed within 18 inches of the applicable exterior wall.

4. Legal Liability

We do not propose, or otherwise contemplate, that antenna ban overrides would in any manner eliminate or mitigate an Amateur Radio Operator’s normal liability for possible property damage, failure to remove the antenna and/or related equipment upon leaving the premises and so on.

5. Why We Need Antenna Ban Overrides

As we noted earlier, a growing percentage of housing stock in the United States

-- accounting for at least 40% of residential neighborhoods -- is subject to antenna bans imposed by Homeowners' Associations (HOAs) and/or restrictive covenants.

Further, in rental housing that is not governed by HOAs and/or restrictive covenants, antenna bans are still typically imposed by landlords. As more and more owner-occupied housing has become unaffordable for many Americans, antenna bans by landlords have become a more significant force -- particularly with respect to younger Americans, who were not able to purchase homes at a time when real dollar costs were substantially lower.

Between HOAs, restrictive covenants and landlords, a majority of America's housing stock falls under antenna bans of one type or another. Freedom to erect even a modest antenna has been shrinking, with much of the remaining free areas limited to older homes and/or homes outside of major metropolitan areas.

The effect of the antenna prohibitions is to ban much Amateur Radio activity. This occurs because antennas mounted indoors are not particularly effective. Amateur Radio operators living in this housing are limited to mobile or portable operation away from their residence. Since most people spend a lot of time at home, their opportunities for Amateur Radio operation, including emergency preparedness training, are very limited.

The antenna prohibitions strike very hard at young people who would like to participate in Amateur Radio. This inhibits youthful interest in Amateur Radio and its Emergency Communications opportunities.

As HFA also noted earlier, there are jurisdictions where HOAs are actually required in new neighborhoods by law. In such areas, HOAs are clearly a product of government policy rather than market forces.

More common are HOAs which buyers or renters of new homes cannot escape because all banks in the area require developers to require HOAs as a pre-condition for financing. The matter is settled between the bank and the developer before the buyer ever arrives on the scene. We submit that such HOAs are not the product of market forces, either.

In any event, even market forces should be subject to reasonable regulation --especially when national security and emergency preparedness are at stake. That is the case with antenna bans which effectively bar Amateur Radio emergency communicators from a majority of the nation's neighborhoods.

It is not enough to allow for "suspension" of antenna bans during emergency situations. Few citizens, if any, are going to invest money in the necessary equipment, and both time and money in the training to use that equipment, if they can only operate in an occasional disaster. If the FCC wants hams to provide Emergency Communications for these neighborhoods *later*, it must empower hams to operate in these neighborhoods *now*.

6. Requested Action

For the reasons set forth herein, we urge the Federal Communications Commission to grant this Petition For Rulemaking, proposing partial and conditional overrides of certain bans on Amateur Radio exterior antennas and related equipment, and proceed expeditiously to issuance of a proposed rule.

Respectfully Submitted,

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